

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JUSTIN LAROY FAGAN, #1709241	§	
VS.	§	CIVIL ACTION NO. 6:12cv363
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge John D. Love, who issued a Report and Recommendation concluding that the petition for a writ of habeas corpus should be dismissed without prejudice for failure to exhaust state habeas corpus remedies. Petitioner filed objections. He asserted that he sent the appropriate paper work to the Gregg County District Clerk and thought that he had exhausted his state remedies when it came back denied.

Petitioner was convicted for the offense of aggravated assault in Gregg County, Cause Number 40,050-A, on March 23, 2011. His conviction was affirmed. *Fagan v. State*, 362 S.W.3d 796 (Tex. App. - Texarkana 2012, pet. ref'd). The Texas Court of Criminal Appeals refused his petition for discretionary review on May 16, 2012. The issues raised on appeal concerned the sufficiency of the evidence. The last entry in the Gregg County records shows that the mandate was received on June 25, 2012. There was no mention of an application for a writ of habeas corpus. See <http://co.gregg.tx.us/OdysseyPA/CaseDetail.aspx?CaseID=1336388>. It is also noted that the Texas Court of Criminal Appeals' website does not show that an application for a writ of habeas corpus was ever received from Petitioner.

The present petition was filed in the Northern District of Texas on May 31, 2012, shortly after the Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review. The case was transferred to this Court. Petitioner specified that other than the direct appeal, he did not file any petitions, applications or motions from this judgment in any court, state or federal. Petitioner argued that he is entitled to relief because of insufficient evidence, prosecutorial misconduct, ineffective assistance of counsel and problems surrounding the plea bargain offered by the State. It is clear that the last three grounds for relief were not presented to and ruled on by the Texas Court of Criminal Appeals, thus Petitioner has not exhausted his state court remedies. *Richardson v. Procnier*, 762 F.2d 429, 431-32 (5th Cir. 1985); *Tipton v. Thaler*, 354 Fed. Appx. 138, 140 n.1 (5th Cir. 2009).

The Report and Recommendation of the Magistrate Judge, which contain his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Petitioner, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore the Court adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DISMISSED** without prejudice for failure to exhaust state habeas corpus remedies. A certificate of appealability is **DENIED**. All motions not previously ruled on are hereby **DENIED**.

So ORDERED and SIGNED this 27th day of July, 2012.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE